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tracting away this less fundamental and more recently established governmental function are evidently less cogent than in case of the police power, the exercise of which is the primary duty of the state. Furthermore, where the waiver is by a municipal corporation, since the state is not a party to the contract, there seems to be no basis, in spite of intimations to the contrary in the principal case, for regarding the state's power to regulate as also waived.¹⁵ The latter power remaining intact, any objections to such contracts on the ground of public policy, are without foundation.

THE EXTRA-TERRITORIAL FORCE OF A DECREE BY A COURT OF EQUITY. — A decree affecting a foreign *res*, either positively or negatively, is often asked against the defendant in a court of equity. Since the court has jurisdiction by personal service,¹ with the resulting power to enforce the decree by an imprisonment of the person of the defendant, it can refuse to grant the relief sought only on the ground that it is inexpedient, or in violation of the principles of the conflict of laws, to interfere with property within the territory of a foreign sovereign. Thus relief has been given against a threatened tort to foreign property,² or against acts in foreign territory constituting a breach of contract.³ Even such relief, however, involving as it does no positive act within a foreign territory, has been refused,⁴ though only on the ground of inexpediency; for clearly no sovereign would object to an exercise of such slight control over his property. It has been suggested that a decree compelling the defendant to perform within the jurisdiction of the court an act which will interfere affirmatively with foreign property, such as the conveyance of foreign lands by a defendant trustee, may be justified by the implied consent of the sovereign whose territory is thereby affected.⁵ But the fact that such a decree is recognized as valid under the full faith and credit clause of the Constitution of the United States⁶ demonstrates that the sovereign rights of a state are not impaired by such jurisdiction. It is possible that cases involving slight extra-territorial action under the direction of the court might be justified by an implied consent; but any decree

¹⁵ *Contra*, 56 Fed. 339, 345. The state has been held bound by a franchise granted by a city. *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1. But the state is the real grantor of a franchise, so that there is no analogy to a contract. *State, Hutchinson, et al. v. Belmar*, 61 N. J. L. 443.

¹ Personal service is necessary when no *res* is within the jurisdiction. *Wallace Wilson v. American Palace Car Co. of New Jersey*, 65 N. J. Eq. 730.

² *Alexander v. Tolleston Club of Chicago*, 110 Ill. 65; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462; *Schmaltz v. York Mfg. Co.*, 204 Pa. St. 1; *Munson v. Tryon*, 6 Phila. 395; *Jennings Bros. & Co. v. Beale*, 158 Pa. 283; *French v. Maguire*, 55 How. Prac. (N. Y.) 471; *Frank v. Peyton*, 82 Ky. 150.

³ *Schofield v. Railway Co.*, 43 Oh. St. 571, 621.

⁴ *Foreign torts*: *Morris v. Remington*, 1 Pars. Eq. (Pa.) 387; *Atlantic Pacific Telegraph Co. v. Balt. & Ohio R. R. Co.*, 46 N. Y. Super. Ct. 377; *Lindsley v. Union Silver Star Mining Co.*, 26 Wash. 301; *Northern Indiana Ry. Co. v. Mich. Central R. R.*, 15 How. (U. S.) 233. As to trespass, see 15 HARV. L. REV. 579.

Breach of contract in foreign territory: *Delaware L. & W. Ry. Co. v. New York S. W. Ry. Co.*, 12 N. Y. Misc. 230; *W. U. Tel. Co. v. Western & Atlantic R. R.*, 8 Baxt. (Tenn.) 54; *W. U. Tel. Co. v. P. A. Tel. Co.*, 49 Ill. 90.

⁵ See 21 HARV. L. REV. 354.

⁶ *Massie v. Watts*, 6 Cranch (U. S.) 148. The cases in state courts are collected in AMES, CASES IN EQUITY, p. 10, note 10.

requiring decided affirmative relief, such as one of specific performance, would be open to attack for lack of jurisdiction.⁷ Certainly no sovereign could order a partition⁸ or sale⁹ of foreign lands. The abatement of a foreign nuisance, also, would seem to be without the jurisdiction of a court of equity. Nevertheless a federal court sitting in Arizona recently granted an injunction against a tort of this character: the waste waters of the defendant's canal, the intake of which was in Mexico, were flooding the plaintiff's land in Arizona. *The Salton Sea Cases*, 172 Fed. 792 (C. C. App. Ninth Circ.). If property in Mexico had been damaged, so that the injury as well as the act causing it had taken place in the foreign territory, the weight of authority would be against such a decision.¹⁰ Similarly specific reparation of a tort or breach of contract, necessitating the performance of acts on territory outside the jurisdiction of the court, should not be given.¹¹ The principal case, however, is fully supported by precedent.¹² And the distinction is clear; for, although it appeared that the defendant might act affirmatively in Mexico, the court did not actually decree any performance in Mexico; nor was an act in Mexican territory necessary to carry out the injunction, as stoppage of the waters could be made in Arizona. So the defendant in the suit could not successfully plead lack of jurisdiction; and the prevention of local injury fully justified a decree which the court knew would indirectly lead to affirmative action in Mexico. It is seen, therefore, that the limitation on the power of a court of equity arising from a foreign *situs* of the property in controversy is, in cases of affirmative relief, absolute, because of the resulting lack of jurisdiction in the sovereign state; while if negative relief is sought, the limitation becomes a mere question of expediency.¹³

DEBTOR OF THE ESTATE AS PERSONAL REPRESENTATIVE OF THE DECEDENT. — A claim in which obligor and obligee are one was, to the mind of the mediæval lawyer, unthinkable; and the appointment of a debtor as executor or administrator rendered a debt unenforceable.¹ In the case of the administrator such a result was so obviously beyond the contemplation of the decedent that its consequences were avoided by allowing the claim to be revived after the unity of its parties ceased.² The executor's

⁷ *The Port Royal R. R. Co. v. Hammond*, 58 Ga. 523. (Specific performance refused.) It is to be noticed that the jurisdiction actually exercised by a sovereign must not be given undue weight when it affects foreign subjects or foreign territory, as then its validity must be tested by the law of all nations.

⁸ *Johnson v. Kimbro*, 3 Head (Tenn.) 557. See cases collected in *Binney's Case*, 2 Bland 99, 145.

⁹ *Fall v. Eastin*, 215 U. S. 1; *Poindexter v. Burwell*, 82 Va. 507. But a sale may be accomplished indirectly if the court has jurisdiction over a person who has power to make a conveyance. See note 6, *ante*.

¹⁰ *Mississippi & Missouri Ry. Co. v. Ward*, 2 Black (U. S.) 485; *People of N. Y. v. Central R. R. Co. of N. J.*, 42 N. Y. 283.

¹¹ It would seem that no court has attempted to grant such affirmative relief.

¹² *Miller & Lux v. Rickey*, 127 Fed. 573; *J. P. Stillman & Co. v. White Rock Mfg. Co.*, 3 Wood. & M. 538; *Willey v. Decker*, 11 Wyo. 496. *Contra*, *Morris v. Remington*, *supra*.

¹³ This distinction is not taken by text-writers. DICEY, *CONFLICT OF LAWS*, 2 ed., p. 204; POMEROY, *EQUITY JURISPRUDENCE*, 3 ed., ¶ 1318.

¹ *Nedham's Case*, 8 Co. 135 a.

² *Hudson v. Hudson*, 1 Atk. 460.